United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,204
(Crim. No. 619-69)

UNITED STATES OF AMERICA,

Appellee,

vs.

GEORGE J. ABSTON,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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George J. Abston, Appellant
(By Appointment of This Court)

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered by the United States District Court for the District of Columbia upon appellant's conviction, after trial by jury, of violations of 22 D. C. Code 1401 and 18 U. S. Code 2314.

The United States District Court for the District of Columbia had jurisdiction of the matter by virtue of 11 D. C. Code §521. The jurisdiction of this Court is invoked under the Act of June 25, 1948, c 646. 62 Stat. 929 (as amended) 28 U.S.C. § 1291.

STATEMENT OF THE CASE

On November 27, 1968, appellant entered Carter's Liquor Store in the District of Columbia and requested the manager, Ben Weise, to cash a check for him in the amount of $52.96 (Government's Exhibit #1). Mr. Weise cashed the said check, whereupon appellant made a purchase and left. (Tr. 8-9). On November 29, 1970, appellant again entered Carter's Liquor Store and requested Mr. Weise to cash a check for him in the amount of $170.44, (Government's Exhibit #2), which the latter did; whereupon appellant made a purchase and left. (Tr. 10-12)

Appellant was a frequent and regular customer of Carter's Liquor Store and Mr. Weise had cashed many of his checks over the years, all of which had been proper. (Tr. 17)

The aforementioned checks were returned to Carter's Liquor Store from the First National Bank of Sandy Springs, Maryland, with the notation that they were forgeries; whereupon Mr. Weise notified appellant and the latter, being so informed, attempted to make restitution. (Tr. 18-19)

Appellant was subsequently arrested and charged with two separate counts (I and III) of uttering a forged check and two separate counts (II and IV) of interstate transportation of said forged checks.

At the trial below, the Government's witness, Ben Weise, testified that when appellant came into his store to cash the checks in question, he made several statements to the effect of indicating that he had got a new job and that the money represented by the checks were going to pay off some of the crew under his charge. (Tr. 8-12) Further testimony produced by the Government indicated that the checks in question had been stolen from the C. W. Ricketts Company of Maryland and were forgeries, and that they had traveled in interstate commerce in the process of being deposited by Carter's Liquor Store and thereafter presented for payment to the drawee bank. (Tr. 21-36)

At the conclusion of the Government's case, appellant's counsel moved for a judgment of acquittal on the basis that the prosecution had not established a prima facia case of uttering. The trial court indicated that it felt the Government had made out a case for false pretenses rather than uttering since there was no proof of knowledge on the part of appellant that these checks were forgeries, but reserved its ruling until after the defense put on its case. (Tr. 30-35)

The appellant took the stand in his own defense and testified that he received these checks in payment of debts incurred at a

gambling game; that they did not appear improper to him; and that he did not know that they were forged when he received them nor when he cashed them at Carter's. He further testified that he did not make any statements to Mr. Weise, but that upon learning of the fact that the checks were returned from the bank, he attempted to make and did make, restitution. (Tr. 40-45)

At the conclusion of the defense, the trial court denied appellant's motion for judgment of acquittal and sent the case to the jury. (Tr. 104-112)

The jury returned a verdict of guilty on all four counts of the indictment.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Does not the Government's evidence below fail to make out a prima facie case that appellant had specific knowledge that the checks were forgeries when he passed them?

II. Could a jury infer from the Government's evidence that appellant had, beyond a reasonable doubt, specific knowledge that the checks were forged?

III. If the Government's proof made out a case of "false pretenses" and not uttering, did not the trial court have the duty of granting appellant's motion for judgment of acquittal on the counts charged in the indictment?

Statement Required Under Local Rule 8(d)

This case has not previously been before this Court, under either this title or a similar title.

Reference to rulings -none

ARGUMENT

I. The trial court erred in not granting a judgment of acquittal at the conclusion of the Government's case because the prosecution failed to establish a prima facia case of uttering:

(A) There was no evidence from which the jury could reasonably infer that appellant knew the checks were forged.

(B) The Government's proof, at most, made out a case of false pretenses, a separate and distinct offense.

The elements of the felony of uttering a forged check, all of which the Government is required to prove, are (1) That the defendant pass a forged check as true and genuine, (2) with intent to defraud, (3) with specific knowledge that the check is a forgery. 22 D. C. Code, Section 1401. It is essential that the Government establish as part of its case that a defendant knew the instrument was forged. U.S. v. Carll, 105 U.S. 611, 613, 26 L. Ed. 1135 (1882).

The only evidence produced by the Government on the question of appellant's knowledge was the sole testimony of Ben Weise. Mr. Weise stated that appellant came into Carter's Liquor Store on November 27, 1968 and asked him to cash a check for $52.96. (Government's Exhibit #1). The appellant was dressed in a jacket and black chauffeur's cap; his hands were dirty, and he said "I got a new job and it's killing me." Appellant further stated, in the witness' words,

that his work was hard and he had to get over and get cleaned up and give one of the other fellows some of the money. Appellant made a purchase in Carter's, for which Mr. Weise cashed the check in question, charging him twenty-five cents for the service. (Tr. 8-9)

As to the check for $170.44 (Government's Exhibit #2), Mr. Weise testified that appellant came into his store again, two days later, endorsed said check in his presence, and received the cash therefor. Appellant said, at this time, that this money was going to pay the rest of the guys off and "I hate to be handling this money for these people, but you know how it is when you have got a job like I got." (Tr. 10-12)

On cross-examination, Mr. Weise testified that appellant was a regular customer of Carter's Liquor Store, and that he, Weise, had cashed many of his checks over the years, all of which had been proper. He further testified that he got word to appellant that the checks had been returned from the bank and that appellant's wife had made partial restitution. (Tr. 15-19)

The only other witnesses called by the prosecution were (1) Crispin William Ricketts, who testified that the checks were

stolen from his business premises and forged, and that appellant never worked for his company (Tr. 21-25); and (2) A. Hardy Pickett, assistant cashier at First National Bank of Sandy Springs, Maryland, who testified that the checks were presented, through interstate commerce, to his bank for payment and were returned as forgeries. (Tr. 35-36)

The Government rested its case after the above testimony was given. Said testimony is devoid of any proof that appellant knew these were forged checks when he passed them to Ben Weise, and it is difficult to see how such guilty knowledge can be inferred from the circumstances surrounding these transactions. The trial judge indicated in a colloquy with the prosecutor that such proof was lacking, and that from the testimony given the appellant in effect may have lied about his employment to facilitate the checks being cashed, but that this does not carry an inference that appellant knew the checks were forged or that they necessarily had to be. In other words, the Government may have made out a prima facie case of false pretenses, but not uttering. The trial judge stated, before the Government rested, that assuming the truth of the testimony of Mr. Weise and Mr. Picketts, there was no proof that appellant knew that he didn't have any right to these checks or that they were forged. (Tr. 30-35)

Although appellant made a timely motion for judgment of acquittal at the conclusion of the Government's case, the trial judge took the motion under advisement and reserved his ruling.

Appellant took the stand in his own defense and testified that he received the checks in payment of gambling debts and that this was a usual practice in the type of game he played; that he did not know the checks were forged and took them to Carter's because he often cashed checks there; and that when he was apprised that the checks were bad, he immediately offered to make restitution. (Tr. 40-45)

There was nothing in appellant's testimony or defense that could, in any way, be construed as supplying the missing element of the Government's case; i.e. guilty knowledge that the checks were forged. The trial court, however, after the defense rested, denied appellant's motion for judgment of acquittal and sent the case to the jury on the sole charge of uttering.

In considering a motion for judgment of acquittal, the trial judge must assume the truth of the Government's evidence and whether said evidence, without conjecture, will "permit the conclusion of guilt beyond a reasonable doubt within the fair operation of a reasonable mind." Thomas v. U. S. 93 U.S. App. D.C. 392 (1954). Applying this criterion to the case at bar, there was no evidence

produced by the Government that would permit the jury to infer, other than by pure conjecture, that the appellant knew the checks he passed were forgeries. The Government did not attempt to prove, nor was it part of its case, that appellant stole these checks from the Ricketts Company, or that he, himself, forged them. The only basis for any inference at all was the following: (1) that appellant had possession of the checks, and (2) that he made certain statements to Mr. Weise to induce him to cash them. As the trial judge stated, the only reasonable inference that can be drawn from these facts, assuming them to be true, is that appellant intended to defraud Mr. Weise; and he could have had this intention without knowing, specifically, that the checks were forgeries.

The case of Pearson v. State, 8 Md. App. 79, 258 A2d 917 (1969), involved a situation practically identical to the one at bar. There, defendant was charged with uttering a forged check in violation of a state statute. The prosecution showed in its proof that the check had been stolen, that the signature was a forgery, that appellant represented himself to be the payee, and that after unsuccessfully attempting to cash it and upon being told it was "bad" he tried to run away. The trial court instructed the jury that the mere offering of a false instrument with fraudulent intent, constituted the offense of uttering. The Maryland Court of Special Appeals reversed the

conviction on the basis that the trial court failed to instruct the jury that an element of the offense of uttering was that defendant have "knowledge that the check was forged." The court recognized that the mere act of possession of a forged instrument, and attempting to utter it, cannot give rise to a conclusive inference of guilty knowledge, and stated:

> "....Between these two poles lie cases where a person may pass a forged instrument without knowledge of its falsity, but with the intent to defraud, as, for example, where he undertakes to negotiate an instrument believed genuine belonging to another which he may have found or stolen or for the payment of which sufficient funds were known not to be available. In these instances, the person's intent would be fraudulent but he would not be guilty of uttering a forged instrument."

In the case at bar, notwithstanding the doubts that the trial court had at the conclusion of the Government's testimony, it sent the case to the jury and permitted the jury to draw a broad and improper inference from the Government's evidence. The trial court, if it felt as it no doubt did, that the Government's proof at best showed "false pretenses" and not uttering, should have granted a judgment of acquittal. It's failure to do so was reversible error.

Although the trial court inquired about including an instruction to the jury on "false pretenses", both counsel for the Government and counsel for appellant stated they did not want such an instruction.

The Government, in opposing such instruction, argued (1) that the jury would not be able to make such a sophisticated distinction between the offenses of uttering and false pretenses, and (2) that the Government wanted to proceed strictly under the theory of uttering and not false pretenses because that was the sole theory presented to the grandyjury. (Tr. 108) Counsel for appellant opposed such an instruction because he felt false pretenses was a separate and distinct offense not charged in the indictment nor proferred by the Government's proof.

This court has held that two offenses are "separate and distinct" if one is not "necessarily included" within the other. Crosby v. United States, 119 U.S. App. D.C. 244 (1964). This court has held, further, that the "lesser included offense" doctrine should not be invoked to extend an indictment to cover what is not there nor to subject a defendant to conviction for other offenses merely to conform to the Government's proof. "What is controlling is the offense charged in the indictment, not the offense established by the trial proof." Kelly v. United States, 125 U.S. App. D.C. 207 (1966)

Under the holding in Kelly, supra, and in view of the Government's position that uttering was the sole theory it wished to prosecute it cannot be argued that appellant prejudiced his rights in refusing the instruction on "false pretneses."

CONCLUSION AND REQUEST FOR RELIEF

In consideration of the foregoing, it is respectfully requested that the judgment of conviction entered herein against appellant be reversed and that a judgment of acquittal be entered as to all counts of the indictment, or in the alternative that a new trial be ordered.

Respectfully Submitted,

MERVYN I. ARONOFF
Attorney for:
George J. Abston,
Appellant
(By Appointment of This Court)

BRIEF FOR APPELLEE

United States Court of Appeals
for the District of Columbia Circuit

No. 2423

UNITED STATES OF AMERICA, APPELLEE

v.

GEORGE J. ADDUM, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
STEPHEN W. GRAHAM,
JOHN Z. RYDER,
Assistant United States Attorneys.

Cr. No. 51542

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OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

In the opinion of appellee, the following issue is presented:

Whether the evidence was sufficient to support appellant's conviction?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,204

UNITED STATES OF AMERICA, APPELLEE

v.

GEORGE J. ABSTON, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed April 28, 1969, appellant was charged with two counts of uttering forged checks[1] and two counts of causing the same to be transported in interstate commerce.[2] Appellant was tried on December 22, 1969, before United States District Judge Gerhard A. Gesell, sitting with a jury, and found guilty as charged on December 23, 1969. On April 2, 1970, he was sentenced to terms of imprisonment of one to three years on each of the two uttering counts, and five years on each of the two interstate transportation counts, pur-

[1] 22 D.C. Code § 1401.

[2] 18 U.S.C. § 2314.

suant to 18 U.S.C. § 4208 (a) (2), all sentences to run concurrently. This appeal followed.

Within a three-day period in November 1968, appellant passed two forged checks totaling $222.44 to Ben Weise, manager of Carter's Liquors at 1941 Fourteenth Street, N. W. Mr. Weise had cashed checks for appellant for several years for amounts of $50 to $60 and sometimes, but "very rare," for as much as $70. On November 27, 1968, appellant cashed a check (Government Exhibit 1) for $52, made out to him as payee and drawn on the account of Trash Disposal Service, Inc., at the First National Bank of Sandy Springs (Maryland) by C. W. Ricketts.[3] He explained to Mr. Weise, "I got me a new job and it's killing me," and said that he was going to be a supervisor for a trash hauling outfit. Two days later, on November 29, 1968, appellant cashed a similar second check (Government Exhibit 2) for $170.44. At that time he stated that he was working for Trash Disposal Services, Inc., the company whose name was printed on the check. He explained the relatively large amount of the check by saying that he had to "pay the rest of the guys off" and added, "I hate to be handling this money for these people, but you know how it is when you have got a job like I got" (Tr. 10). Appellant endorsed the checks in Mr. Weise's presence. Mr. Weise deposited them to the corporate account of Carter's Liquors at the Industrial Bank of Washington. They were subsequently returned unpaid and marked "forgery"[4] (Tr. 4-24).

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[3] Mr. Ricketts testified that he did business as Trash Disposal Services, Inc., and that he signed all checks. He stated that he did not sign the two checks (Government's Exhibits 1 and 2) which appellant passed and that the checks were two of a series of blank checks taken in a burglary of his office on November 9, 1968. He did not know appellant, had never employed him, and never wrote any checks payable to him (Tr. 21-27).

[4] Mr. A. Hardy Pickett, assistant cashier of the First National Bank of Sandy Springs, testified that the two checks were received for payment in the usual course of business, but were marked as possible forgeries and returned unpaid to the depositary bank through the Federal Reserve Bank in Baltimore [*sic*] (Tr. 35-37).

Appellant admitted cashing the checks with Mr. Weise but said he did not know that they were forgeries. He testified that they were given to him on November 27, 1968, by Leon Witherspoon in payment of appellant's winnings in a crap game. According to appellant, Mr. Witherspoon left the crap game for about thirty to forty-five minutes and returned with the check for $52 made out to appellant. It was then about 6:00 or 7:00 p.m., and he promptly cashed the check at Carter's Liquors. A few days later, he stated, Leon Witherspoon gave him the second check, and he cashed it that same day. He did not think there was anything unusual in the fact the amounts were made out on a checkwriter (appellant's name was written in as payee), or in the brief time it took to get the first check, or in the general circumstances of the transactions. He did not question Mr. Witherspoon about the checks[5] (Tr. 40-63). There was other testimony that restitution totaling $77 has been made (Tr. 18-21, 63-70).

ARGUMENT

The evidence was sufficient for the jury to convict appellant.

(Tr. 3-84)

Appellant argues that the Government's evidence did not show that he had knowledge that the check he passed was a forgery. In the absence of a confession, such knowl-

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[5] After a hearing out of the presence of the jury, the court ruled that the Government could not use in rebuttal a statement which appellant gave to the FBI. That statement was taken in the course of an FBI investigation of the theft of the checks in the December 9, 1968, burglary. Appellant told the FBI that he had received both his checks from a man named "Joseph" in a crap game and that "Joseph" had gotten both checks out of a car. The court ruled, however, that since the statement was given after the charges against appellant had initially been dropped (they were later reinstated), his waiver of his rights prior to making the statement might have been based on the belief that no prosecution could be brought against him (Tr. 82-103).

edge can be shown, as in the case of specific intent, only by the surrounding facts and circumstances.[6]

The facts and circumstances here, as shown by the Government, were that appellant was named as payee on two forged checks prepared (as to amount) on a check-writer. On the occasion of passing each check, he represented himself to be employed by a trash hauling company (both checks had the name Trash Disposal Services, Inc., printed on the face) in a supervisory capacity (Tr. 4-14). On the second occasion he specifically represented that he was employed by Trash Disposal Services, Inc., and that he was charged with paying other employees from the check proceeds. In fact, however, he had never been employed by the company. The owner did not know him, and no checks had ever been issued to him by the company (Tr. 21-27). The evidence in summary was that on two different occasions appellant passed forged checks made out to him as payee and cashed in the course of his fraudulent representations as to how the checks were issued to him. Clearly the evidence was sufficient to take the case to the jury, and the jury could justifiably infer that appellant knew the forged nature of the checks.[7] This is all that the law requires.

In presenting his defense that he won the checks in a crap game, appellant expressed no surprise that "Leon Witherspoon" [8] left the game at 2011 Fourteenth Street, N. W., at about 5:00 or 6:00 p.m. and returned within forty minutes with a check issued by a company in Silver Spring payable to appellant.[9] He made no explanation for

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[6] *See, e.g., Nelson* v. *United States*, 97 U.S. App. D.C. 6, 10, 227 F.2d 21, 25 (1955), *cert. denied*, 351 U.S. 910 (1956).

[7] *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967); *Thomas* v. *United States*, 93 U.S. App. D.C. 392, 211 F.2d 45 (1954); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).

[8] The man who allegedly gave appellant the checks. Compare note 5, *supra*.

[9] The address of Trash Disposal Services, Inc., 16613 New Hampshire Avenue, Silver Spring, Maryland, was printed on the face of each check (Government Exhibits 1 and 2).

his false representations at the time the checks were cashed other than to deny that they had occurred.

From the evidence introduced by the Government, therefore, as well as appellant's failure to explain the false representations he made to get the checks cashed, the jury could infer that he knew the checks were forged.[10] They drew that inference and found him guilty.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
STEPHEN W. GRAFMAN,
JOHN E. ROGERS,
Assistant United States Attorneys.

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[10] Appellant cites the Maryland case of *Pearson* v. *State*, 8 Md. App. 79, 258 A.2d 917 (1969), for the proposition that on facts similar to those here, it was held there was no knowledge that the check that was passed was forged. However, in *Pearson*, unlike the instant case, the defendant proffered a plausible explanation for his representations in trying to get the check cashed. Moreover, *Pearson* was decided on the point that the trial court had failed to instruct the jury that knowledge of the forgery was an element of the crime of uttering. There is no such issue here.

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